PP

v.

TAY KOK WAH

HIGH COURT MALAYA, SHAH ALAM
MOHD YAZID MUSTAFA J
[CRIMINAL CASE NO: 45B-51-2008]
19 MAY 2010

CRIMINAL LAW: *Penal Code - Section 302 - Murder - Accused broke into victim's house to commit theft - Victim suffocated to death - Accused's semen found on victim's bed sheet - Whether accused physically present in victim's bedroom - Prosecution's case based on circumstantial evidence - Whether prima facie case established - Whether case proven beyond reasonable doubt - Probability of accused's defence*

EVIDENCE: *Adverse inference - Failure of defence to call material witnesses - Corroboration - Accomplice evidence - Mutual friend who introduced accused to victim not called to testify and to corroborate contention that victim knew of and were friends with accused - Burden of calling witnesses to corroborate testimony - Alleged accomplices not called to counter testimony of witness*

EVIDENCE: *Circumstantial evidence - Murder - Prosecution's case based on circumstantial evidence - Accused's fingerprints found on window pane of crime scene - Accused's semen stain found on victim's bed sheet - Whether prima facie case established based on circumstantial evidence - Whether case proven beyond reasonable doubt*

The accused was charged for the offences of murder under s. 302 and rape under s. 376 of the Penal Code ('Code'). However, at the end of the prosecution case, the trial judge found that the prosecution had failed to establish a *prima facie* case for the charge under s. 376 and proceeded with trial of the charge under s. 302 of the Code. It was the prosecution's case that the accused had broken into the victim's house to steal the victim's laptop, by removing the window panes of the rear window and bending the iron grille on the window. The accused then tied the victim's hands together using a pillow case and another pillow case was shoved into her mouth, suffocating her to death. The accused's semen, which was found on the victim's bed sheet,

A suggested that the accused was physically present in the victim's bedroom. At the end of the prosecution's case, the court found that a *prima facie* case against the accused on the charge of murder under s. 302 of the Penal Code had been established and the accused was called to enter his defence. In his defence, the B accused contended that he had a sexual relationship with the victim after being introduced to her by a mutual friend ('Wong Kim Meng'). Addressing the semen stain found on the victim's bed sheet, the accused testified that after each sexual act, he would wipe his semen on the victim's bed sheet. It was the accused's C story that he, along with three others namely Thanabalan, Ngendran and Nathan Kumar ('SP14'), had broken into the victim's house to steal the victim's laptop. While Ngendran was on the look out, the accused pried open the grille kitchen door. The accused then removed two window panes and pried open the iron D window grilles using a stick. Fearing that he would be identified by the victim, the accused did not enter the house while Thanabalan and SP14 proceeded to enter and steal the victim's laptop. The accused further testified that he saw Thanabalan and SP14 taking the house keys and car keys from a coffee table in E the hall before opening the front door and exiting.

Held (convicting accused and sentencing him to death):

(1) The version of fact contended by the accused was improbable and a mere fictional story aimed at exculpating himself from F the charge. The accused had failed to raise any reasonable doubt against the evidence of the prosecution. The prosecution had established the charge of murder against the accused beyond reasonable doubt. (paras 28 & 34)

G **(2)** Although the accused alluded that Wong Kim Meng had allegedly introduced him to the victim, Wong Kim Meng was not called to testify and to corroborate the contention that the victim knew of and were friends with the accused. The contention of the accused that he allegedly had a sexual H relationship with the victim upon the request and invitation of the latter was a mere concoction. The contention of a non-existent relationship between the victim and the accused was not a probable explanation as to the finding that the DNA of the accused was recovered from the semen stain on I the victim's bed sheet. (para 29)

(3) It was improbable that the accused could have seen what had transpired inside the house after SP14 and Thanabalan had allegedly entered the house. The accused could not have possibly seen into the house as his view would have been obstructed by a wall dividing the kitchen area from the hallway. This was apparent from the sketch plan and photograph of the interior of the house. The only probable and reasonable explanation for the accused to have known what his two accomplices were doing inside the house was because the accused had also entered the house. (para 30)

(4) It was improbable that the alleged accomplices of the accused would have thrown caution aside and exit through the front door after their initial care they took in avoiding detection. The only explanation left was that the testimony of the accused was a mere concoction and an afterthought. (para 30)

(5) The person that was physically proven to have entered the victim's house and bedroom was the accused. Apart from the fingerprint and DNA of the accused recovered from the victim's house, the accused had admitted that he had touched and removed the window pane from which his fingerprints were retrieved. The accused had also admitted that he had left his semen on the victim's bed sheet. In light of the court's rejection of the alleged relationship with the victim, the conclusion arrived at regarding the semen was that his presence in the victim's bedroom was illegal. (para 31)

(6) The burden of calling witnesses to corroborate the testimony of the accused was upon the accused and not the prosecution. The prosecution had *prima facie* established the ingredient of the charge of murder against the accused. The burden had shifted to the accused to substantiate his testimony by calling the alleged accomplices to testify. These two could have been called to counter the testimony of SP14. However, the accused chose not to do so. Therefore, s. 114(g) of the Evidence Act 1950 did not operate against the prosecution evidence but that of the accused. (para 33)

Case(s) referred to:

Adnan Mat Jusoh v. PP [2010] 3 CLJ 13 CA ***(refd)***

Chan Kwee Fong v. PP [2010] 3 CLJ 671 CA ***(refd)***

Jayaraman Velayuthan & Ors v. PP [1982] CLJ 464; [1982] CLJ (Rep) 130 FC ***(refd)***

A *Karam Singh v. PP [1967] 1 LNS 65 FC* ***(refd)***
Mohamed Yasin Hussin v. PP [1976] 1 LNS 75 PC ***(refd)***
Nor Hasnizam Ab Latif v. PP [2002] 1 CLJ 49 CA ***(refd)***
PP v. Muhamad Sulaiman [1982] CLJ 540; [1982] CLJ (Rep) 292 FC ***(refd)***
B *Tham Kai Yau & Ors v. PP [1976] 1 LNS 159 FC* ***(refd)***
Yeap Boon Hai v. PP [2010] 2 CLJ 338 CA ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 114(g)
Penal Code, ss. 300, 302, 376

C *For the prosecution - Nordin Ismail; DPP*
For the accused - James George; M/s James George & Co

Reported by Najib Tamby

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JUDGMENT

Mohd Yazid Mustafa J:

E **[1]** On 25 February 2010, I had convicted the accused for the charge of murder under s. 302 of the Penal Code and sentenced the accused to death by hanging by the neck. The accused was originally charged for the following offences:

First charge:

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Kamu didakwa atas kehendak Pendakwa Raya dan pertuduhan terhadap kamu adalah: Bahawa kamu pada 2 Ogos 2007, jam lebih kurang 4.30 pagi, di alamat No. 27, Jalan Putra 4/1, Seksyen 1 Bandar Mahkota Cheras, Kajang, di dalam daerah Hulu Langat, di dalam Negeri Selangor Darul Ehsan, telah membunuh
G Tang Lai Meng (No. K/P: 871004-08-5384), dan dengan itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan.

Second charge:

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Kamu didakwa atas kehendak Pendakwa Raya dan pertuduhan terhadap kamu adalah: Bahawa kamu pada 2 Ogos 2007, jam lebih kurang 4.30 pagi, di alamat No. 27, Jalan Putra 4/1, Seksyen 1 Bandar Mahkota Cheras, Kajang, di dalam daerah Hulu Langat, di dalam Negeri Selangor Darul Ehsan, telah merogol
I Tang Lai Meng (No. K/P: 871004-08-5384), dan dengan itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 376 Kanun Keseksaan.

[2] On 6 January 2010, I had found that the prosecution has not established a *prima facie* case against the accused for the second charge under s. 376 of the Penal Code and had acquitted and discharged the accused without calling the accused to enter his defence on the second charge. There has been no appeal by the prosecution on the acquittal and discharge for the 2nd charge under s. 376 of the Penal Code. The trial of the case had thus proceeded for the first charge under s. 302 of the Penal Code. The following grounds of judgment are therefore premised on the charge of murder under s. 302 of the Penal Code against the accused. The prosecution had called 19 witnesses to testify on its behalf. The facts as established through the prosecution witnesses are as follows.

Facts As Established By The Prosecution Evidence

[3] On 2 August 2007, the accused had entered the victim's rental house from the rear entrance, tied up the victim's hands together using a pillow case and put another pillow case into the victim's mouth thus causing her to suffocate to death. The accused was placed at the scene of the crime on 2 August 2007 by the testimony of his cousin, Nathan Kumar a/l Vijandran, SP14. According to SP14, the accused was staying in the same house as SP14 and his family which was situated opposite to the victim's house. On 2 August 2007 about 4.30am, the accused had awoken SP14 and requested the latter to accompany the accused to break and enter into the victim's house. The purpose was to steal certain items belonging to the victim. The accused entered into the victim's house through the rear entrance. SP14 assisted by bending the bottom part of the kitchen grille door with a hoe. The accused removed the window panes of the rear window and bent the iron grill on the window with a piece of wood plank before entering the victim's house. SP14 had not followed the accused into the house but returned home. About 6am on the same day, SP14 discovered that the accused had stolen several items from the victim's house *viz.* a laptop and a handphone and had taken the victim's car. SP14 then assisted the accused in disposing off the stolen items.

[4] The fact that the victim's assailant had entered into her house through the rear kitchen window is supported by the testimony of the investigating officers SP4 and SP19 including the crime scene investigator, SP17. The opening of the rear grille door

A is about eight inches in width. The testimony of SP4, SP17 and SP19 has confirmed that is it possible for an adult man with the same thin physique as the accused at the time of his arrest to squeeze through the opening of the rear grille door. The opening between the bent iron grilles on the kitchen window is seven
B inches in width and 13 inches in length. The testimony of SP4, SP17 and SP19 has confirmed that it is possible for a physically thin adult man, such as the accused at the time of his arrest, to enter the kitchen through the opening between the bent iron grilles on the kitchen window by first placing his feet through the
C iron grille followed with the rest of his body.

[5] SP17 had examined the four window panes found on the ground at the rear of the house. Two fingerprints were recovered from two of the window panes marked as 'C1' on the window
D pane marked as 'A' and 'C2' on the window pane marked as 'B'. These marked items were sent to SP13 for fingerprint testing. SP13 testified that he received the two fingerprints on the lifting cards marked as C1 (exh. P24A) and C2 (exh. P24B) on 9 August 2007. The lifting card marked as C1 did not have
E sufficient fingerprint characteristic for SP13 to conduct the fingerprint testing. However, the lifting card marked as C2 had sufficient characteristics and SP13 had carried out the fingerprint testing on C2. The fingerprint on C2 was the same as the fingerprint on the RJ 2C police form (exh. P2) registered under
F the name of the accused. SP13 had enlarged the fingerprints on both C2 and the RJ 2C police form and made a comparison of both fingerprints (See exh. P23). The result of the comparison was that the fingerprints on C2 and the RJ 2C police form had 12 similar characteristics. According to SP13, the accuracy of the
G testing and comparison of the fingerprint on C2 and on the RJ 2C police form is 100%.

[6] The prosecution has shown that the accused was physically present in the bedroom in which the accused was murdered on
H the date of death through the testimony of the crime scene investigator, SP17 and the forensic analyst SP18. SP17 referred to the photograph number 38 in exh. P10 and testified that he had marked the area on the bed sheet that contained upon it a semen stain as No. 2. The bed sheet containing the semen stain
I was then sent for analysis to SP18. According to SP18, the DNA profile of the semen stain on the bed sheet ie, No. 2 in photograph 38 of exh. P10 is a match with the DNA of the

accused. SP18 conducted a DNA analysis and comparison between the semen stain to the blood sample of the accused (marked as '21') on 15 August 2007. The chemist report was prepared on 29 August 2007. According to SP18, the probability for another randomly selected individual to have a DNA profile similar to that of the accused is one in 5.9 sextillion (See exh. P49 at p. 3) calculated on the Malaysian Chinese population database. Therefore, the accuracy of the DNA analysis is 99.99%.

[7] The forensic pathologist, SP16 testified that the cause of death of the victim was asphyxia due to gagging with cloth (see the post mortem report in exh. P28). The post mortem on the victim was carried out by SP16 on 3 August 2007 at 3pm. SP16 had observed that the victim's mouth was gagged with a bolster pillow case that was light blue in colour. The victim's hands were tied back together with a black coloured t-shirt. The bolster pillow case is tied around the victim's neck and the end was stuffed into the victim's mouth. Another pillow case was also stuffed into the victim's mouth. The victim had died for more than six hours because the body was *rigor mortis*. The victim had suffocated to death because of the pillow case stuffed into her mouth that prevented her breathing. The fact that the victim had suffocated to death was also proven by the conjunctiva bleeding on both eyes evidencing lack of oxygen. The victim had sustained several bruises on her body evidencing the existence of a defensive struggle with her assailant. According to SP16, the position of the bruises on the victim's body shows that the assailant was on top of the victim while forcefully holding down the victim at her waist during the ordeal of having her mouth stuffed with the pillow cases. The bruises on the victim's body were mostly on the front part of her torso. This fact, according to SP16, is evidence that the victim was attacked by one person. SP16 did not agree with the suggestion that there could have been two persons that had attacked the victim.

Findings Of The Court At The End Of The Prosecution Case

[8] The victim has been identified as one Tang Lai Meng whose cause of death was asphyxia due to gagging with cloth. The court finds that the accused has been identified as the person who had caused the death of the victim and the accused had the requisite *mens rea* to murder the victim under s. 300 of the Penal Code.

The Accused Was The Person Who Had Caused The Victim's Death

[9] In coming to the *prima facie* finding that the accused was the person who had caused the victim's death, the court is relying on circumstantial evidence *viz*. The fingerprints of the accused found on the window panes of the kitchen window of the victim's house and the DNA of the accused recovered from the semen stain found on the bed sheet of the victim's bed. In assessing the circumstantial evidence to support this finding, the court is bound by the principles developed by the Federal Court in *Karam Singh v. PP* [1967] 1 LNS 65; [1967] 2 MLJ 25 at 29 where it was held by Ong Hock Thye FJ (as he then was) that:

> In a case where the prosecution relies on circumstantial evidence, such evidence must be inconsistent with any other hypothesis than that of the guilt of the accused.

[10] The court is also relying on the judgment of the Court of Appeal delivered by His Lordship Low Hop Bing JCA in the case of *Yeap Boon Hai v. PP* [2010] 2 CLJ 338 had occasioned to refer to *Jayaraman Velayuthan & Ors v. PP* [1982] CLJ 464; [1982] CLJ (Rep) 130 whereby Suffian LP (as he then was) held that:

> ... in a case tried without a jury and depending on circumstantial evidence, it is enough for the trial judge to remember only that the prosecution need prove its case beyond reasonable doubt, and failure by him to also say that the circumstances are not only consistent with the accused having committed the crime but also such that they are inconsistent with any other reasonable explanation, is not fatal. In other words, in a case depending on circumstantial evidence, it is enough if the court merely says that it is satisfied of the accused's guilt beyond reasonable doubt, without further saying that the facts proved irresistibly point to one and only one conclusion, namely the accused's guilt.

[11] The court finds that the circumstantial evidence *viz*, the fingerprints of the accused and the DNA of the accused are established through the testimony of the expert witnesses ie, the fingerprint analyst, SP13 and the forensic analyst, SP18. SP13 has minutely carried out the required standard test for comparing the fingerprint on the lifting card C2 to the fingerprint of the accused on the RJ 2C police form. SP13 testified that the fingerprint on the C2 card and the fingerprint of the accused contained a similarity of 12 characteristics and that the test is 100% accurate

that the fingerprint on the C2 card is that of the accused. As for the DNA of the accused, SP18 carried out the DNA testing and comparison of the semen stain recovered from the victim's bed sheet to the blood sample of the accused and testified that the probability of another Chinese man having the same DNA as that of the accused is highly improbable and that the results are 99.99% accurate that the DNA recovered from the semen stain found on the victim's bed sheet is that of the accused. These expert witnesses are in this court's opinion experienced and skilled in performing the requisite fingerprint and DNA testing in accordance to the requisite standards for both tests. Through their testimony, the court is satisfied as to their qualifications and the fact that they have conducted the requisite tests properly and minutely to ensure the accuracy of the test results.

[12] In assessing and accepting the testimony of these expert witnesses, the court is bound by the recent decision of the Court of Appeal in *Chan Kwee Fong v. PP* [2010] 3 CLJ 671 at 689-690 where it was held that:

> The reception of expert evidence is governed by s 45 of the Evidence Act 1950. It sets out the situations in which expert opinion evidence is admissible. An expert evidence is based on his training and experience. Expert witnesses have the advantage over lay witnesses by virtue of their particular skill or training. This enables the experts to form opinions and to draw inferences from observed facts and it would also enable them to identify facts which may be obscure or invisible to a lay witness. An expert witness just like a witness of fact has to give evidence on oath and he may be cross-examined on it. However, the expert must give evidence of his qualifications so that the court will be able to consider his opinion evidence.

[13] The investigating officers, SP4 and SP19 including the crime scene investigator, SP17 have testified that the opening between the two iron grilles on the kitchen window of the victim's house was about seven inches in width and 13 inches in length. According to these witnesses, the width and length was sufficiently wide enough for a thin adult man, such as the accused at the time of his arrest, to enter the victim's house. I find that the investigating officers *viz.* SP4 and SP19 had the first information regarding the evidence recovered from the crime scene and the scene of the crime itself and have the required experience regarding assessment of a crime scene. As for SP17, he is a

A sufficiently experienced crime scene investigator and has shown through his testimony that his investigations are carried out with the utmost detail. In *PP v. Muhamad Sulaiman* [1982] CLJ 540; [1982] CLJ (Rep) 292 at 295, Suffian LP in delivering the judgment of the Federal Court held that:

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> As to the question whether or not Mr Lum is an expert, it is true that this is a preliminary question to be determined, but it is a question upon which, in practice, considerable laxity prevails. This is because while the expert must be 'skilled', he need not be so by special study, he may be so by experience; and the fact
> C that he has not acquired his knowledge professionally goes merely to weight and not to admissibility.

[14] The circumstantial evidence read with the testimony of SP14 that the accused had broken into and entered the victim's house
D on 2 August 2007, lead the court to only one conclusion *viz.* that the accused was the person that had forcefully tied up the victim, stuffed a pillow case into her mouth and tied another pillow case around her neck thus causing the victim to suffocate to death. The defence counsel has argued that the testimony of SP14 is
E unreliable seeing as SP14 was an accomplice of the accused. The court finds that SP14's testimony is consistent and credible that he had merely assisted the accused in entering the victim's house upon the request of the latter. SP14 was never the accomplice of the accused in the murder of the victim. The court is therefore
F able to accept the testimony of SP14 in establishing the fact that the accused alone had broken into and entered the victim's house on 2 August 2007.

[15] In *Yeap Boon Hai v. PP* [2010] 2 CLJ 338 at 352, the Court of Appeal held that:

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> We are of the view that no hard and fast rule can be laid down for determining the credibility or otherwise of a witness. It is only when a witness gives or makes two statements which differ in material particulars that there is ground for believing that he is not
> H a truthful witness: per Ali J (as he then was) in *Mohamed Kasdi.* Hence, if in a case the prosecution leads two sets of evidence, each one of which contradicts and strikes at the other and shows it to be unreliable, then the court would be left with no reliable and trustworthy evidence upon which the conviction of the accused might be based, as inevitable the accused would have the
> I benefit of such a situation.

[16] The conclusion that the accused was the person who had caused the death of the victim on 2 August 2007 is arrived at despite the fact that no other persons had witnessed the accused tying up the victim, stuffing the victim's mouth with a pillow case and tying a pillow case around her neck and stuffing the end of the pillow case in her mouth. The court's finding is purely based on circumstantial evidence of the fingerprints and DNA of the accused read with the testimony of SP14 to place the presence of the accused in the victim's bedroom on 2 August 2007. In *Adnan Mat Jusoh v. PP* [2010] 3 CLJ 13 at 27, the Court of Appeal held through the judgment of His Lordship Wan Adnan Muhamad that:

> Walaupun tiada sesiapa yang melihat tertuduh melakukan pembunuhan tetapi keterangan saksi-saksi (SP10, SP11, SP12, SP13) yang melihat tertuduh berada di tempat kejadian di mana simati dijumpai mati dan kematian simati disebabkan tikaman dan bukan kerana terbakar (keterangan SP15) serta keterangan ikut keadaan yang dikemukakan oleh pihak pendakwaan menunjukkan kesalahan oleh tertuduh dan bukan kepada lain-lain orang.

[17] It is pertinent to note that SP14's testimony is not that he had witnessed the accused murdering the victim but only that he had assisted the accused upon the latter's request to break into and enter the victim's house. SP14 had testified that after the accused entered the victim's house, SP14 had returned home. Despite the fact that there was no other witness that had witnessed the accused actually causing the victim's death, I accept SP14 as a credible witness in establishing that the accused had broken into and entered the victim's house on 2 August 2007 within the time period that the victim was murdered.

Did The Accused Have The Mens Rea To Murder The Victim

[18] This court finds that the accused had the *mens rea* or intention to murder the victim by causing her to suffocate to death. This conclusion is arrived based on the fact that the victim was forcefully tied up, her mouth stuffed with a pillow case, her neck tied with a pillow case and the end of the pillow case also stuffed into her mouth. One of the factors that could assist the court in making an inference as to the intention to murder is the

A nature and extent of the injury inflicted on the victim. In the Federal Court case of *Tham Kai Yau & Ors v. PP* [1976] 1 LNS 159; [1977] 1 MLJ 174 at p. 176, it was held that:

> Whether the offence is culpable homicide or murder depends upon
B the degree of risk to human life. If death is a likely result, it is culpable homicide; if it is the most probable result, it is murder. It is culpable homicide if the bodily injury intended to be inflicted is likely to cause death; it is murder if such injury is sufficient in the ordinary course of nature to cause death.

C **[19]** In *Nor Hasnizam Ab Latif v. PP* [2002] 1 CLJ 49 at 52 the Court of Appeal held that:

> On the question of intention to kill, it is a matter of inference from the nature of the wounds and it is pertinent to refer to the case of *Tan Buck Tee v. PP* [1961] MLJ 176 at p 179 where
D Thomson CJ (as he then was) observed: There was the body with five appalling wounds on it, wounds penetrating to the heart and liver, which must have been caused by violent blows with a heavy sharp instrument like an axe. In the absence of anything else, whoever inflicted those blows must have intended to kill the
E person on whom they were inflicted.

[20] The fact that there was force imposed on the victim during the ordeal of being tied up and gagged is established through the testimony of the forensic pathologist SP16. SP16 testified that
F there were evidence of a struggle and defensive bruises on the front part of the victim's body. The position of the bruises indicates that the victim's assailant was facing her, lying on top and holding her down forcefully at the waist whilst tying her up and gagging her with the pillow cases. SP16 has testified that the
G pillow case tied around the victim's neck had left a mark on her neck. The victim's upper and lower lips had a cut. The court finds that these facts indicate that the accused had forcefully tied the pillow case around her neck and similarly had forcefully stuffed the pillow cases into her mouth. The court also finds that SP16's
H testimony that the victim's fingernails had turned blue because of lack of oxygen is evidence that the pillow cases tied around the victim's neck and stuffed into her mouth had sufficiently caused her death.

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[21] In *Mohamed Yasin Hussin v. PP* [1976] 1 LNS 75; [1976] 1 MLJ 156 at 157, Lord Diplock in delivering the judgment of the Privy Council held that:

> In the instant case, the bodily injury caused by the appellant's voluntary act was the fracture of the victim's ribs. It was established by the evidence of the pathologist that this injury was of a kind sufficient in the course of nature to cause death by cardiac arrest. The lacuna in the prosecution's case which the trial judges overlooked was the need to show that, when the accused sat forcibly on the victim's chest in order to subdue her struggles, he intended to inflict upon her the kind of bodily injury which, as a matter of scientific fact, was sufficiently grave to cause the death of a normal human being of the victim's apparent age and build even though he himself may not have had sufficient medical knowledge to be aware that its gravity was such as to make it likely to prove fatal.

[22] The testimony of SP16 that the most the victim could have remained breathing was for 20 minutes from the time she was gagged is an indication that the act of the accused in tying up and forcefully gagging the victim was the most probable cause and not merely the likely cause of the victim's death. Put in another way, the death of the victim caused by the accused was the most probable result and thus was murder under s. 300 of the Penal Code. In *Tham Kai Yau & Ors v. PP* [1976] 1 LNS 159; [1977] 1 MLJ 174 at p. 176 where it was held by the Federal Court that:

> Whether the offence is culpable homicide or murder depends upon the degree of risk to human life. If death is a likely result, it is culpable homicide; if it is the most probable result, it is murder. It is culpable homicide if the bodily injury intended to be inflicted is likely to cause death; it is murder if such injury is sufficient in the ordinary course of nature to cause death.

[23] The accused had illegally broken into and entered the victim's house in the early morning hours on 2 August 2007. There was no probable reason for the victim to be forcefully tied up and gagged had the intention of the accused been otherwise apart from intending to murder the victim. In *Nor Hasnizam Ab Latif v. PP* [2002] 1 CLJ 49 at 53, Mohd Saari JCA in delivering the judgment of the Court of Appeal held that:

> Looking from another perspective, we fail to see why appellant had to draw out a knife. He was not in danger not was he being threatened by anyone. Yong was only a child aged five years and he could not have done any harm to appellant.

The fact that the victim was forcefully tied up and gagged by the accused was not due to any accident or act of negligence on the part of the accused. The accused deliberately entered the victim's house and deliberately caused her death.

[24] In conclusion, after according the prosecution evidence to a maximum evaluation, the court finds that the prosecution has established a *prima facie* case against the accused on the charge of murder under s. 302 of the Penal Code. The accused was called to enter his defence. The accused has elected to give evidence from the witness stand. The following is a summary of the testimony of the accused.

The Defence Case

[25] The accused testified that at the date of the victim's death, he was staying with his aunt and her family at the aunt's house which was opposite the victim's house. The accused had stayed at his aunt's house one month prior to 2 August 2007. The accused is contending that he was acquainted with the victim through a mutual friend. One week after being introduced to the victim, the accused had begun having sexual relations with the victim at the rate of every two days. The accused is contending that prior to the victim's death he had sexual relations with her for four times on four separate dates. The last date in which he had sexual relations with the victim was one week prior to her death. The accused testified that he had wiped his semen stain on the victim's bed sheet after every sexual act.

[26] The accused testified that on 2 August 2007, he had gone to the victim's house about 4.30am. He had gone to the victim's house with his three relatives ie, SP14, Thanabalan and Ngendran. The reason for going over to the victim's house on 2 August 2007 was to assist his three cousins in committing theft of the victim's laptop in the house. The reason for the theft was to sell off the laptop to obtain money to pay off Ngendran's debts with a restaurant owner and to celebrate SP14's birthday on 4 August 2007. The accused testified that Ngendran had remained as a lookout in the middle of the road between his aunt's house and the victim's house. The accused had entered the unlocked gate at the rear of the victim's house with SP14 and Thanabalan. The accused pried open the grille kitchen door by pulling the lower end

outwards. The accused and Thanabalan then entered the victim's outer yard through the pried open grille door whilst SP14 remained outside. Thanabalan attempted to enter the kitchen through the ceiling but the entry was blocked. The accused then removed two window panes. SP14 had handed over a long stick shaped like a hoe to the accused but the latter found that the hoe shaped stick was too long to be used to pry open the iron rods on the window. The accused then removed another two window panes. The accused had pried open the iron grilles on the window using a four inch stick handed over by SP14. Both sticks have been submitted as evidence in court and identified by the accused as the items which he had used. Thanabalan had entered the kitchen through the bent iron grilles and had opened the wooden door to allow SP14 to enter the kitchen.

[27] According to the accused, it was only Thanabalan and SP14 that had entered the victim's house pass the kitchen area on 2 August 2007 and remained inside the house for about 20-25 minutes. The accused did not enter the kitchen because he did not want to be caught by the victim. The accused testified that SP14 and Thanabalan had taken the victim's laptop from the upper part of the house. The accused testified that he could see SP14 and Thanabalan taking the house keys and car keys from a coffee table in the hall before opening the front door and exiting. Before exiting the house, SP14 had told the accused to go to the front of the house. SP14, Thanabalan and Ngendran returned home and stood at the gate of their house. SP14 handed the victim's car keys to the accused and instructed the latter to drive the victim's car to a nearby housing area and parked near a block of flats. SP14 had taken the laptop, exited the car with the accused and entered a nearby restaurant. The time was about 7am. Ngendran had arrived at the restaurant about 7.30 am. The accused was driven by Ngendran to a friend's house in Cheras. The victim's laptop, car keys and car were in the possession of Ngendran after the accused left them to go to Cheras. In cross-examination, the accused agreed that his fingerprints were recovered on the window panes of the victim's kitchen window. The accused agreed that if his contention that he had repeated sexual relations with the victim, his semen would be sprayed all over the bed sheet and not just concentrated in one spot on the bed sheet. The accused testified that he was afraid of being

A accused of murder at the time of arrest. In re-examination, the accused had testified that for each sexual relation with the victim, he had ejaculated inside the victim. This testimony is despite his earlier testimony in examination-in-chief that he wiped his semen on the victim's bed sheet after each sexual act.

B

Findings At The End Of The Defence Case

[28] The version of facts contended by the accused is improbable. The court finds that the version of facts as contended by the accused is a mere fictional story aimed at exculpating the C accused from the present charge.

The Alleged Relationship With The Victim

[29] The accused alluded to a mutual friend of his and the D victim's by the name of 'Wong Kim Meng' that had allegedly introduced them. However, apart from alleging the existence of such a mutual friend, the accused has not called the said 'Wong Kim Meng' to testify and corroborate the contention that the victim knew of and were friends with the accused. The court E finds that the prosecution has established that the victim's only boyfriend at the time of her death was Puan Wing Kah, SP15. SP15 was the boyfriend who had provided for the rental house to the victim, bought the victim a laptop and provided a handphone to the victim. SP15 was the only boyfriend who F visited and had sexual relations with the victim at her rental house four - five times from the time she had stayed in the house. SP15 was therefore the only man with whom the victim had sexual relations without the existence of any force or coercion. In addition, there is no evidence to show that the relationship G between the victim and SP15 was bad or deteriorating. In light of the fact that the victim did not know the accused and the good relationship between the victim and SP15, the court finds that the contention of the accused that he allegedly had sexual relations with the victim upon the request and invitation of the latter is a H mere concoction. The contention of a non-existent relationship between the victim and the accused is not a probable explanation as to the finding and analysis of the forensic analyst, SP18 that the DNA of the accused was recovered from the semen stain on the victim's bed sheet.

I

The Alleged Accomplices

[30] The accused testified that he did not enter the kitchen pass the wooden kitchen door for fear of being caught breaking and entering the victim's house by the victim. The accused was allegedly standing guard at the kitchen entrance during the time that his accomplices, SP14 and the said Thanabalan were allegedly committing theft inside the victim's house for 20-25 minutes. It is improbable that the accused could have seen what had transpired inside the house after SP14 and Thanabalan had allegedly entered the house. The accused could not have possibly seen into the house because his view would have been obstructed by a wall dividing the kitchen area from the hallway. The testimony of the accused that he had seen SP14 opened and exit through the front door is also improbable because there is another wall opposite the front door that is obstructing the view from the kitchen. This is apparent from the sketch plan (exh. P38) and the photograph (picture number 7 of exh. P10) of the interior of the house. The only probable and reasonable explanation for the accused to have known what his two accomplices were doing inside the house was because the accused also entered the house. The accused was therefore not standing guard outside of the kitchen entrance. The court finds that it is improbable and illogical for the accomplices of the accused to have allegedly entered the victim's house from the rear entrance and exit through the front door. If this testimony is accepted as the true sequence of events the court questions the need for the accused to be stationed as a guard at the kitchen entrance while the alleged accomplices were inside the victim's house. The testimony of the accused regarding the entry from the rear entrance indicates that the accused and his alleged accomplices had taken pains to avoid detection by the victim or any other neighbour. The court finds it improbable that the alleged accomplices of the accused would have thrown caution aside and exit through the front door after their initial care in avoiding detection. The only explanation left is that the testimony of the accused is a mere concoction and afterthought.

[31] The improbability of the testimony of the accused is compounded further by the contention that Thanabalan entered the kitchen through the bent iron grille of the kitchen window and opened the wooden kitchen door to allow entry by SP14. This is because the kitchen door remained closed and barred with a

wooden pole from within (See picture number 7 exh. P10). The photographs in exh. P10 were taken by the police photographer, SP10 on 2 August 2007. Therefore exh. P10 *viz.* picture number seven is evidence of the actual state of the victim's kitchen on the date of her death. If the accused is telling the truth, the wooden kitchen door would not have been closed and barred by the wooden pole. The accused did not testify whether he, Thanabalan or SP14 closed the wooden kitchen door and re-barred it with the wooden pole after entry or before exiting the victim's house. The more probable explanation is that the wooden kitchen door was never opened by Thanabalan. In fact, Thanabalan or SP14 had never been inside the victim's house. The person that is physically proven to have entered the victim's house and bedroom is the accused. Apart from the fingerprint and DNA of the accused recovered from the victim's house, the accused has admitted that on 2 August 2007, he touched and removed the window pane from which his fingerprints were recovered. The accused also admitted that he left his semen on the victim's bed sheet. In light of this court's rejection of the alleged relationship with the victim, the conclusion arrived at regarding the semen stain is that his presence in the victim's bedroom was illegal.

[32] The accused, in cross-examination, stated that when he was arrested, he was afraid that he would be accused of murder. Upon being asked by the Deputy Public Prosecutor whether he knew the person whom he had killed, the accused replied 'saya tidak membunuh dia'. The accused did not testify that his fear was being arrested for the burglary. The accused had testified that after SP14 and he had disposed of the stolen items belonging to the victim, he stayed with a friend in another housing area for one week prior to his arrest. The accused did not mention knowing or being informed regarding any murder. The only reason for his fear of being accused of murder is that he was the person who had committed the murder of the victim. The only explanation for knowing about the victim's murder was that the accused is the murderer. The accused was the only person who had illegally entered the victim's house on 2 August 2007.

Failure To Call Corroborating Witnesses

[33] The burden of calling witnesses to corroborate the testimony of the accused is upon the accused and not the prosecution. The prosecution has *prima facie* established the ingredients of the charge of murder against the accused. The burden has shifted to

the accused to substantiate his testimony by calling the alleged accomplices to testify *viz*. Thanabalan and Ngendran. These two alleged accomplices could be called to counter the testimony of SP14. However, the accused has chosen not to do so. The court finds that s. 114(g) of the Evidence Act 1950 is not operated against the prosecution evidence but that of the accused.

Conclusion

[34] The court finds that the accused has failed to raise any reasonable doubt against the evidence of the prosecution. Therefore, the court finds that the prosecution has established the charge of murder against the accused beyond a reasonable doubt. The accused is found guilty and convicted on the charge of murder against him and is sentenced to death by hanging by the neck.